Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-04–301 OF 2006
GOPAL SRI RAM, ABDULL HAMID EMBONG, AND ZAINUN ALI JJCA
8 AUGUST 2008

Civil Procedure — Time — Certiorari — Application for judicial review — Date of decision, when made — Whether there had been inordinate delay — Rules of the High Court 1980 O 53 r 3(6)

Equity — Estoppel — Issue estoppel — Whether applicable in public law and judicial review — Whether any special circumstances which may allow the court to reopen issue in subsequent proceedings

Local Government — Town planning — KL Structure Plans — Whether such plan legally binding — Federal Territory (Planning) Act 1982 (Act 267) s 10(1)

The appellants sought to challenge an administrative decision taken by the first respondent (ie Datuk Bandar Kuala Lumpur) in connection with a proposed burial ground neighbouring the appellants' condominium. Earlier, on 18 November 2003, an originating summons ('OS') was filed by the Desa Kiara Condominium Residents and Owners Association ('DKORA') against the first respondent. The OS was dismissed with costs and subsequent appeal by DKORA was withdrawn. The first respondent explained that the 2020 Structure Plan which made no provision to use the buffer land as burial grounds was merely a conceptual plan and did not contain an exact or detailed aspect for physical land use planning. In the judicial review application, the appellants sought, inter alia; (a) a declaration that the buffer land was not suitable and/or unfit to be used as burial ground; (b) an order of certiorari to quash the decision of the first respondent to: (i) not revoke the licence issued to the second respondent permitting the use of the buffer land as a burial ground; (ii) not close down the said burial ground. The first respondent raised three preliminary issues before the High Court. These were: (a) res judicata and issue estoppel were applicable as a bar; (b) that there had been a substantial delay in challenging the decision made by the first respondent; (c) that the alleged decision that was made the subject matter of the substantive application was not susceptible to judicial review.

Held, dismissing the appeal with costs:

(1) The appellants knew of the decision made by the first respondent on 10 June 2003 when it was communicated to their representative on 8 November 2003. By this date the buffer land had been cleared for the project. The notice board publicising the project on 15 November 2003 and newspaper reports appeared thrice in the following two weeks. In the circumstances, the appellants could not deny they were aware of the project. Further, the OS was filed by the appellants' association, DKORA on 18 November 2003 (see paras 55–57).

(2) It was crucial to first identify definitely what the decision was that was sought to be impugned. The appellants interpretation towards the first respondent's non-response to their letter made no sense and far stretching one's imagination and would give rise to an artificial meaning to the word decision. The date of the decision too became fictitious which made the computation of the statutory time limit under O 53 of the Rules of High Court 1980 ('RHC') indeterminable. Thus, taking 8 November 2003 as the latest date the decision was communicated, calculated to 14 February 2005 ie the date of filing this application for a judicial review there clearly had been inordinate delay in breach of O 53 r 3(6) RHC (see paras 62–63).

(3) It was clear from the evidence that, the buffer land was not meant to be an open space or recreational area; that the KL Structure Plans is but a document on planning policies and strategies which are subject to changes and variations and that there was a lack of burial grounds for the ever increasing KL population. Therefore the court found no basis in the appellants' contention that the KL Structure Plans was a legally binding instrument. It was a document merely stating the policies of the first respondent and thus not legally binding on anyone (see paras 84–85).

(4) The balance of justice in the present case lay in favour of the respondents as there was nothing illegal or improper for the respondents to use the buffer land as an additional burial ground. In any event, the project on the buffer land had long been completed although till now not yet utilised in view of this pending case. Public monies have been spent. Meanwhile the public awaits this new facility (see paras 106–108).

[Bahasa Malaysia summary

Perayu-perayu memohon untuk mencabar suatu keputusan pentadbiran yang dibuat oleh responden (Datuk Bandar Kuala Lumpur) berkaitan dengan cadangan tempat pengebumian yang terletak bersebelahan dengan

kondominium perayu-perayu. Pada 18 November 2003, suatu saman pemula ('SP') difailkan oleh Persatuan Penduduk dan Pemilik Desa Kiara Kondominium ('PPPDKK') terhadap responden. SP tersebut ditolak dengan kos dan rayuan oleh PPPDKK ditarik balik. Responden pertama menjelaskan bahawa Pelan Struktur 2020 tidak membuat peruntukan bagi penggunaan tanah penampan sebagai tanah perkuburan dan pelan tersebut hanyalah pelan konsepsi dan tidak mengandungi aspek terperinci tentang pelan penggunaan tanah fizikal. Dalam permohonan semakan kehakiman, perayu-perayu memohon, antara lain; (a) suatu perisytiharan bahawa tanah penampan tersebut tidak sesuai dan/atau tidak layak dijadikan tanah perkuburan; (b) suatu perintah certiorari membatalkan keputusan responden pertama untuk: (i) tidak membatalkan lesen yang dikeluarkan kepada responden kedua yang membenarkan penggunaan tanah penampan sebagai tanah perkuburan; (ii) tidak menutup kawasan tanah perkuburan tersebut. Responden pertama menimbulkan tiga isu awalan di hadapan Mahkamah Tinggi. Isu-isu awalan tersebut adalah:(a) res judicata dan estoppel boleh diguna pakai sebagai penghalang; (b) berlakunya kelewatan yang substansial dalam mempertikaikan keputusan responden pertama; (c) bahawa keputusan tersebut yang menjadi hal perkara dalam permohonan substantif tidak tertakluk kepada semakan kehakiman.

Diputuskan, menolak rayuan dengan kos:

(1) Perayu-perayu sedia maklum tentang keputusan responden pertama pada 10 Jun 2003 apabila keputusan tersebut diberitahu kepada wakil-wakil mereka pada 8 November 2003. Pada tarikh tersebut, tanah penampan tersebut diluluskan untuk projek tersebut. Notis dikepilkan di papan kenyataan pada 15 November 2003 dan laporan akhbar terbit tiga kali dalam dua minggu berikutnya. Dalam keadaan ini, perayu-perayu tidak dapat menafikan bahawa mereka tidak tahu tentang projek tersebut. Tambahan pula, SP yang difailkan oleh persatuan perayu-perayu, PPPDKK pada 18 November 2003 (lihat perenggan 55–57).

(2) Adalah penting untuk mengenal pasti dengan tepat apakah keputusan yang ingin dipertikaikan. Tafsiran perayu-perayu terhadap kegagalan membalas surat mereka oleh responden pertama tidak masuk akal dan tidak boleh dibayangkan dan akan memberikan maksud yang tidak tepat kepada perkataan keputusan. Tarikh keputusan juga direka-reka dan menjadikan pengiraan had masa statutori di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') tidak dapat ditentukan. Oleh itu, mengambilkira 8 November 2003 sebagai tarikh terkini keputusan tersebut dimaklumkan, dikira sehingga 14 Februari 2005 iaitu tarikh pemfailan permohonan ini untuk semakan

kehakiman, jelas terdapat kelewatan melampau yang melanggar A 53 k 3(6) KMT (lihat perenggan 62–63).

(3) Adalah jelas daripada keterangan bahawa tanah penampan tersebut tidak diniatkan untuk menjadi suatu tanah lapang atau pun dijadikan kawasan rekreasi; bahawa Pelan Struktur KL adalah suatu dokumen polisi-polisi dan strategi-strategi perancangan yang tertakluk kepada perubahan-perubahan. Malah, terdapat kekurangan tanah perkuburan di Kuala Lumpur yang penduduknya kian bertambah. Oleh itu, mahkamah mendapati hujah plaintif bahawa Pelan Struktur KL adalah dokumen yang mengikat dari segi undang-undang tidak berasas. Pelan tersebut hanyalah dokumen yang menyatakan polisi-polisi responden pertama dan tidak mengikat sesiapa pun (lihat perenggan 84–85).

(4) Imbangan keadilan dalam kes ini berpihak kepada responden-responden memandangkan tiada apa yang salah di sisi undang-undang atau tidak elok bagi responden-responden menggunakan tanah penampan tersebut sebagai tanah perkuburan. Apa pun, projek atas tanah penampan itu telah lama siap walaupun hingga kini belum digunakan kerana kes yang masih tertangguh ini. Wang rakyat sudah pun digunakan, tetapi rakyat masih tertunggu-tunggu untuk menggunakan kemudahan baru ini (lihat perenggan 106–108).]

Notes

For cases on certiorari, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7724–7726.

For cases on issue estoppel, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2702–2703.

For cases on town planning generally, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 186–191.

Cases referred to

Ali v Secretary of State for the Home Department [1984] 1 All ER 1009 (refd)

Arnold v National Westminster Bank Plc [1991] 2 AC 93 (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)

Brisbane City Council v Attorney-General for Queensland [1978] 3 All ER 30) (refd)

Carl-Zeiss Stiftung v Rayner and Keeler Ltd & Ors [1967] 1 AC 853 (refd)

Chee Pok Choy v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346 (refd)

Davies v Macedon Ranges SC [1999] VCAT 196 (refd)

Griffiths & Anor v Secretary of State for Environment & Anor [1983] 2 AC 51 (refd)

Johnson v Gore Wood & Co (a Firm) [2001] 1 All ER 481 (refd)

Kembang Masyur Sdn Bhd lwn Milik Perusahaan Sdn Bhd & lain-lain [2005] 4 MLJ 553 (refd)

Khoo Ah Imm @ Chang Bee Kiam & Ors v Datuk Bandar Kuala Lumpur & Anor [1997] 2 MLJ 602 (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1 (refd)
Mersing Omnibus Co Sdn Bhd v Minister of Labour & Manpower & Anor [1983] 2 MLJ 54 (refd)
R v Secretary of State for the Environment, Ex Parte Hackney London Borough Council & Anor [1983] 3 All ER 358 (refd)
Ravindran v Malaysian Examination Council [1984] 1 MLJ 168 (refd)
Sangram Singh v Election Tribunal AIR 1955 SC 425 (refd)
Smith & Ors v Inner London Education Authority [1978] 1 All ER 411 (refd)
Tarling, Re [1979] 1 All ER 981 (refd)
YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Jaafar v Datuk Bandar Kuala Lumpur & Anor [2005] 5 MLJ 633 (refd)

Legislation referred to

Courts of Judicature Act 1964 para 1 of the Schedule
Federal Territory (Planning) Act 1982 s 10(1)
Local Government Act 1976 s 94, 94(1)
National Land Code s 62
Rules of the High Court 1980 O 53, O 53 r 3, O 53 r 3(6)

Appeal from: Judicial Review No R2–25–33 of 2005 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (Malik Imtiaz Sarwar) for the appellants.
B Thangaraj (Thangaraj & Associates) for the first respondent.
Md Izzam Zailani (Haris Azmi & Associates) for the second respondent.

Abdull Hamid Embong JCA (delivering judgment of the court):

[1] This appeal is lodged against the decision of the learned High Court judge in dismissing the appellants' application for judicial review with costs.

[2] In the High Court, the appellants sought to challenge an administrative decision taken by the first respondent (ie, Datuk Bandar Kuala Lumpur) in connection with a proposed burial ground neighbouring the appellants' condominium. The learned judge found that:

(a) the preliminary issue raised by the respondents were sufficient to dismiss the application; and

(b) in any event, the learned judge concluded that the grounds advanced by the appellants in support of the judicial review proceedings were not made out and dismissed their substantive motion.

[3] Earlier, on 18 November 2003, an originating summons ('OS') was filed by the Desa Kiara Condominium Residents and Owners Association ('DKORA') against the first respondent seeking for the following prayers:

(a) An injunction prohibiting Majlis Agama Islam Wilayah Persekutuan, (now the second respondent), and Datuk Bandar Kuala Lumpur, (now first respondent) from developing or using Lot 84 (formerly Lots 920, and 921) and Lot 1560 as a burial ground;

(b) An injunction prohibiting Datuk Bandar Kuala Lumpur from issuing a licence or permit or granting or agreeing to develop Lot 84 and Lot 1560 as a burial ground, in the alternative;

(c) In the event the licence or permit or grant or agreement has been given, an order that Datuk Bandar Kuala Lumpur withdraw or revoke the licence or permit or grant or agreement;

(d) A prohibitive order against the Pengarah Jabatan Tanah dan Galian Wilayah Persekutuan from using or allowing the use of Lot 84 and Lot 1560 as a burial ground;

(e) A declaration that the development on Lot 84 and Lot 1560 was against the law and illegal; and

(f) Damages.

[4] The OS was dismissed with costs. On 31 March 2004, DKORA lodged an appeal which they subsequently withdrew on 14 July 2004.

[5] In this judgment, the references to DKORA and appellants are used interchangeably since the latter are members of the former, and privy to the actions of the former.

FACTS

[6] The salient facts as we now perceive them from the various affidavits, are as follows:

(a) The appellants are the owners of residential units in Desa Kiara Condominium (the condominium) which is situated on Lot number 922, Jalan Damansara, Kuala Lumpur. The first respondent is the local authority in charge with administering the municipal affairs of the city of Kuala Lumpur. It includes ascertaining suitable lands to be used as burial grounds;

(b) there is an existing Muslim burial ground located on Lot 51567, Jalan Damansara, Kuala Lumpur (existing burial ground) which is located about 136 meters from the condominium. The existing burial ground is about 4,199 hectares in size and had been in existence since 1984, under the care, management and control of the second respondent;

(c) Lot Number 84 and Lot 1560, is government land located between the condominium and the existing burial ground. The said land about 3.88 hectares in area, is the subject matter of this appeal. The appellants had referred to the said land as the 'buffer land'; and we borrow this reference in our judgment;

(d) in 1976, the government had acquired the buffer land for the purpose of constructing a sewerage treatment plant ('STW'). However, the project to construct the STW was relocated to another site;

(e) due to insufficient space in the existing burial ground, the second respondent ie, Majlis Agama Wilayah Persekutuan made a request to Jawatankuasa Kerja Tanah Wilayah Persekutuan (the Land Authority), who is the authority having jurisdiction on land situated in the Federal Territory of Kuala Lumpur, to extend the existing burial ground to the buffer land;

(f) the Land Authority had by letter dated 6 May 2003 (first respondent's affidavit(2)) granted the approval to reserve the buffer land as a Muslim burial ground pursuant to s 62 of the National Land Code, 1960 (NLC).

(g) Subsequently, the Land Authority requested the first respondent's consent to extend the existing burial ground on to the buffer land, and pursuant to a meeting held on 10 June 2003 the first respondent agreed to the request to extend the existing burial ground to the buffer land. This approval date was the finding of the learned judged who held that this was the date of a decision made of under s 94(1) of the Local Government Act 1976 under which a local authority may provide for burial grounds and crematoria. This remained a contentious issue in this appeal. More of this later;

(h) meanwhile, the Ministry of Finance ('MOF') had agreed to finance the works relating to the extension of the burial ground in the buffer land;

(i) the contract for the works in the sum of RM5,935,815 was awarded to Pribena Construction Sdn Bhd — Pembinaan & Letrik Mals Sdn Bhd JV. Apart from works relating to the extension of the burial ground to the buffer land, it also includes maintenance of the Extended Burial Ground for a period of 4 years;

(j) the works on the buffer land commenced sometime in November 2003 and was completed on 20 November 2004 at a total cost of RM6,431,893.60;

(k) on 27 December 2004, the appellants submitted a letter dated 22 December 2004 to the first respondent from DKORA seeking, inter alia, that the first respondent revoke the licence issued for the purpose of the said burial ground. The first respondent was asked to revert within 7 days failing which the first respondent would be deemed to have made a decision not to revoke the licence;

(l) according to the appellants by choosing to remain silent and not reply, the first respondent had in effect taken an administrative decision not to exercise its power provided under the law. The appellants further alleged that they were adversely affected by that administrative exercise of discretion which subsequently led to this application before the High Court to quash the so called decision;

(m) the first respondent had issued two Kuala Lumpur Structure Plans, one in 1986 and another recently in 2004. They are both known as the 2000 and 2020 Structure Plans respectively and that both the 2000 and 2020 Structure Plans made no provision to use the buffer land as burial grounds;

(n) the first respondent explained that the 2020 Structure Plan is merely a conceptual plan and does not contain an exact or detailed aspect for physical land use planning. This would be stated in the Local Plan for Kuala Lumpur which, to date, is not yet ready.

[7] As regards, the judicial review application, the appellants had sought for the following reliefs:

(a) a declaration that the buffer land is not suitable and/or unfit to be used as burial ground;

(b) an order of certiorari to quash the decision of the first respondent to:

(i) not revoke the licence issued to the second respondent permitting the use of the buffer land as a burial ground;

(ii) not close down the said burial ground;

(c) an order of mandamus that the first respondent do revoke the said licence;

(d) an order of mandamus that the first respondent do take all steps necessary to ensure that the said burial ground be closed; and/or

(e) damages.

[8] Against that background, the first respondent raised three preliminary issues when this application first came up before the High Court. These are:

(a) Res judicata and issue estoppel are applicable as a bar.

(b) That there had been a substantial delay in challenging the decision made by the first respondent, said to be on 10 June 2003.

(c) That the alleged decision that was made the subject matter of the substantive application is not susceptible to judicial review.

[9] The learned judge heard arguments on the preliminary issues and decided in favour of the first respondent on all those issues.

[10] Her Ladyship then went on to consider the substantive application. That too was dismissed.

[11] We now consider the preliminary issues which were recapitulated in this appeal.

RES JUDICATA AND ISSUE ESTOPPEL

[12] For a start, we observe, from a comparison of the relief sought by the appellants in this judicial review application and in the earlier OS filed by DKORA it points to one central pursuit, ie, to question the suitability of the buffer land as a burial ground. This point that counsel of first respondent raised, is however not crucial in considering an issue estoppel plea, for unlike in a cause of action estoppel, the subject matter need not be identical for this defence (see *Arnold v National Westminster Bank Plc* [1991] 2 AC 93).

[13] We are also in agreement with learned counsel of the first respondent that the requirement of same parties involved (ie DKORA and the present appellants) in the OS and the appeal before us, is fulfilled, to enable them to raise the res judicata and issue estoppel defence.

[14] The appellants' opposing argument was that the doctrine of res judicata was inapplicable to public law actions to correct an injustice such as occurred here in view of the underlying wrongful or illegal exercise of powers by the first respondent, contemplated in this action. The first respondent submitted otherwise, stating that the doctrine should apply based on the facts of the case and in particular to prevent vexatious applications or those which abuse the process of the court.

[15] The first respondent argued by stating that there is the principle of res judicata in a wider sense whereby it becomes an abuse of process to raise in subsequent proceedings, matters which could and should have been litigated in earlier proceedings.

Re Tarling [1979] 1 All ER 981 and *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 were cited as authorities for this proposition.

[16] The appellants on the other hand relied on *Ali v Secretary of State for the Home Department* [1984] 1 All ER 1009. The appellants referred to a line in the judgment of Sir John Donaldson MR who stated that the doctrine of issue estoppel 'has no place in public law and judicial review' citing *R v Secretary of State for the Environment, Ex Parte Hackney London Borough Council & Anor* [1983] 3 All ER 358.

[17] Other authorities which we have considered below also show that issue estoppel is not absolute and there may arise special circumstances (eg, change in material facts or law) which may allow the court to reopen the issue in a subsequent proceeding (see *Arnold*'s case).

[18] We agree with the appellants' stand that the doctrine has no application in this appeal, for the following reasons.

[19] This application for judicial review is made under O 53 of the Rules of the High Court 1980.

[20] In *R v Secretary of State for the Environment, Ex Parte Hackney* it was held that:

> the doctrine (of issue estoppel) cannot be relied on in applications for judicial review under RSC O 53.

[21] May LJ in his judgment gave the following reasons, which we adopt, for the non application of this doctrine:

> The principle that relief under RSC Ord 53 is granted in discretion only, as well as the obligation to obtain leave from the court before an application for relief can be made, seems to us to be contrary to the concept of a final determination of an issue between parties which is at the root of issue estoppel. The court, under this jurisdiction, is fully able to give effect to the rule of public policy that there should be finality in litigation, which underlies the doctrines of issue estoppel in civil litigation and the prohibition against double jeopardy in criminal prosecution, by the use of its powers to refuse to entertain applications and to refuse to grant relief in the process of judicial review of administrative acts or omissions; this is

particularly but not exclusively so when the application may be oppressive, vexatious or an abuse of the process of the court.

[22] At home, this court in *Chee Pok Choy v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 held that:

> Whether res judicata in the wider sense should be permitted to bar a claim is a matter to be determined on the facts of each case, always having regard to where the justice of the individual and particular case lies.

Gopal Sri Ram, JCA in his judgment there pronounced that principle relying on *Carl-Zeiss Stiftung v Rayner & Keeler Ltd & Ors* [1967] 1 AC 853 and in particular this passage from the judgment of Lord Upjohn:

> All estoppel are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.

[23] Another passage from *Arnold v National Westminster Bank plc* was also quoted. It says:

> One of the purposes of estoppel being to work justice between the parties, it is open to the courts to recognise that in special circumstances inflexible application of it may have the opposite result.

[24] In *Johnson v Gore Wood & Co (a Firm)* [2001] 1 All ER 481 Lord Bingham of Cornhill said this of abuse of process:

> … and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.

[25] From these pronouncements and dicta of high authority, it would seem that a flexible approach viewed against the facts of each case, would be preferred when the doctrine is raised as a bar in a judicial review situation. In judicial review, there is always a party who is not present; the wider public or public interest (see *Halsbury's Laws of England*, (4th Ed), Reissue para 983).

A **[26]** The appellants had also argued that the filing of the judicial review application was predicated on a different footing from the OS.

[27] They cited two factual circumstances, ie, the intervening events and the fettering of the Mayor's discretion as new facts to be considered.

B

[28] It seems that after the dismissal of the OS, the Ministry of Housing and Local Government had requested the first respondent to investigate into DKORA's complaint, and the Ministry had sought for an explanation from the first respondent.

C

[29] Subsequently a meeting was held between the Mayor and the representatives of the residents of the condominium.

D **[30]** Later events showed that interest was shown also by the Prime Minister's Department through its Economic Planning Unit in asking the first respondent to discuss the extended burial ground project further with the residents.

E **[31]** For those reasons the appellants argued that the first respondent had given them an impression that the latter would revert to them for a decision on the fate of the burial ground.

[32] The appellants also argued that they had a reasonable and legitimate
F basis for an expectation that their grievances would be more fully considered.

[33] After considering these factors we feel that this application was made on account of public law rights and interests and could not see in it any abuse of the court's process. This doctrine ought only to be applied to instances
G where the facts are such that abuse of process has obviously occurred; otherwise there is a 'danger of a party being shut out from bringing forward a genuine subject of litigation' (see *Brisbane City Council v Attorney-General for Queensland* [1978] 3 All ER 30).

H **[34]** We feel that the overriding objective of justice does not allow a rigid application of the doctrine in this instance. We would conclude that there are special circumstances here to disallow the operation of the doctrine (see *Arnold*'s case).

I

THE DELAY ISSUE

[35] Order 53 r 3(6) RHC requires prompt action to be taken in an application for judicial review. The application has to be made within 40 days from when the decision is communicated to the applicant.

[36] The appellants had filed their application on 14 February 2005.

[37] On 6 May 2003 the second respondent was notified by the Director of Land of Wilayah Persekutuan ('PTGWP') that the buffer land was approved as a burial ground pursuant to s 62 of the National Land Code.

[38] On 8 July 2003, the first respondent wrote to PTGWP that it had no objection to the alienation of the buffer land as an extension of the existing Muslim burial ground, pursuant to a meeting held by the first respondent on 10 June 2003.

[39] The first respondent contended that this date, 10 June 2003, is the date that the decision pursuant to s 94 of the Local Government Act 1976 ('LGA') was made, for the purposes of O 53 r 3(6) of the RHC.

[40] The MOF had on 23 September 2003, awarded the contract to contractors to implement the project on the buffer land.

[41] On 15 November 2003, a notice board was placed on the buffer land to notify the public of the works being done.

[42] Tractors and mechanical excavators moved into the land to clear it of trees and vegetation.

[43] The appellants first knew of the project on the buffer land on 8 November 2003 when their representative met with a planning officer of the first respondent.

[44] Newspaper reports of the project were published on 20 November 2003, 21 November 2003 and 24 November 2003.

[45] On 18 November 2003, the appellants' association, DKORA filed the OS seeking the injunction against the first respondent and to prohibit the use of the buffer land as a burial ground, and to revoke the licence for its use issued to the second respondent.

A **[46]** The appellants on the other hand, argue that the decision made on 10 June 2003 was not a decision or not a final decision. It was, they said, merely a preliminary decision not yet communicated to the public.

B **[47]** Learned counsel also submitted that the first respondent was obliged to engage the owners and residents of the condominium notwithstanding that purported decision of 10 June 2003.

[48] Subsequently the first respondent had entered into a dialogue with the C owners and residents of the condominium for almost one year.

[49] On 22 December 2004, DKORA wrote to the first respondent seeking confirmation that the first respondent would not use the buffer land as a burial ground. In that letter DKORA gave a one week time frame for the D first respondent to reply, if not the first respondent would be deemed to have made a contrary decision ie, to allow the buffer land to be used as a burial ground.

E **[50]** The first respondent did not respond to that letter.

[51] The appellants now take the stand that the actual decision was made on 5 January 2005 (one week after the first respondent received the letter ie, on 27 December 2004). Thus, there had not been any delay.

F

[52] The appellants contended that to assert that a decision was already made on 10 June 2003 is erroneous.

G **[53]** They further contended that the first respondent had represented to them that the matter was still under consideration.

[54] The learned judge found that there was a delay in making this application. We agree.

H

[55] In our view, the appellants knew of the decision made by the first respondent on 10 June 2003 when it was communicated to their representative on 8 November 2003. By this date the buffer land had been cleared for the project.

I

[56] The notice board publicising the project on 15 November 2003 and newspaper reports appeared thrice in the following two weeks. Against this factual background the appellants cannot deny they were aware of the project. Works was going on in front of their eyes.

[57] Further, the OS was filed by the appellants' association, DKORA on 18 November 2003. Surely, if the decision had not been earlier communicated to them, they would not have gone to court to seek the reliefs in their OS. A

[58] The works on the buffer land was in fact completed on 20 November 2004. On the request of DKORA, the first respondent expended and additional RM315,171.35 to plant trees on the buffer land. B

[59] To say that the decision was only made on 5 January 2005 after the first respondent had failed to revert to their letter of 22 December 2004, is fallacious. We also find it ludicrous for the appellants to hold the view that a decision was only arrived at when the first respondent failed to respond to the one-week time period ultimatum in their letter. The latter was not duty-bound to respond to what we feel, corresponded to a threat. C D

[60] Thus, our view is that no decision was made by the first respondent pursuant to that letter. No decision need in fact be made as it was already made earlier. E

[61] An application for a judicial review under O 53 of the RHC is intended to impugn a decision. This is central to any judicial review. The appellants contended that there was a 'deemed decision' by the first respondent made on 5 January 2005 when it failed to revert to the appellants' letter of 22 December 2004. F

[62] It is thus crucial to first identify definitely what the decision is that is sought to be impugned. This has to be the actual date (see *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1). The appellants' interpretation towards the first respondent's non-response to their letter makes no sense and far stretching one's imagination. This would give rise to an artificial meaning to the word decision. The date of the decision too becomes fictitious which makes the computation of the statutory time limit under O 53 of the RHC indeterminable. G H

[63] Thus, taking 8 November 2003 as the latest date the decision was communicated, calculated to 14 February 2005 ie, the date of filing this application for a judicial review there clearly has been inordinate delay in breach of O 53 r 3(6) of the RHC. I

[64] The appellants had not applied for an extension of time nor was any explanation given for this delay, save for the submission we now hear from their learned counsel.

[65] Order 53 of the RHC confers jurisdiction on the High Court to entertain an application for judicial review seeking any of the prerogative writs mentioned in para 1 of the Schedule to the Courts of Judicature Act 1964.

[66] That jurisdiction may however only be exercised upon obligatory compliance with the imperative requirement of time set under O 53 r 3 of the RHC.

[67] The law is as pronounced by Abdoolcader FJ in *Mersing Omnibus Co Sdn Bhd v Minister of Labour & Manpower & Anor* [1983] 2 MLJ 54 in the following passages:

> ... As the decision of the Minister sought to be impugned is dated November 23, 1981, the period of six weeks would, on a computation under O 3 r 2(2) of the Rules of the High Court, expire on 5 January 1982, and as the application for leave was made on 9 January 1982 the appellant was clearly out of time and no extension of time was sought nor the delay accounted for to the satisfaction of the learned Judge who heard the application as required by the rule. Apparently this point completely escaped all parties involved, as a result perhaps of an affliction of incorrigible somnolence that seems to pervade the perception of the law and practice of the profession from time to time. We took the point ourselves as it clearly goes to the jurisdiction of the court from which leave to apply for certiorari was sought as O 53 r 1(1) stipulates that no application for an order of certiorari shall be made unless leave therefore has been granted and r 1A which we have already adverted to enacts that leave shall not be granted except in accordance with its specific provisions.
>
> Lord Hodson said in his judgment in *Secretary of State for Defence v Warn* (at p 402): 'Procedural sections are usually mandatory and there is nothing which points to the contrary in this case'. In the matter before us *the terms of O 53 r 1 and 1A clearly reflect the imperative requirements which must be complied with before an application for certiorari can be made*. Power in the High Court in regard to certiorari is provided for in the Courts of Judicature Act 1964 in para 1 of the Schedule thereto which sets out the additional powers of the High Court referred to in s 25(2) of the Act but the proviso to s 25 specifically enacts that *all such powers of the High Court in the exercise of its jurisdiction as are referred to therein shall be exercised in accordance with any written law or rules of court relating to the same*. (Emphasis added.)

[68] Thus, compliance with the time frame is fundamental. It goes to the starting point, that of jurisdiction to hear the application. This was clearly

expressed by Hashim Yeop Sani FJ in *Ravindran v Malaysian Examination Council* [1984] 1 MLJ 168; in the following passages:

> In our view of whole issue is clearly one of jurisdiction. In the event only the first consideration of the judge is relevant. Since the judge rejected the explanation for the delay it follows that the court had no jurisdiction to hear the application for leave for an order of certiorari. Whether the application for an order of certiorari had merits or not was irrelevant. This principle is implicit in *Mersing Omnibus Co Sdn Bhd v Minister of Labor and Manpower*. There had been no jurisdiction to hear the application for certiorari because O 53 r 1A of the Rules of the High Court 1980 expressly direct that leave shall not be granted unless the application is made within six weeks after the date of the proceeding.
>
> There are constraints which may or may not be necessary but brought about by a technicality of procedure but which the court has to enforce. A more enlightened situation would seem to obtain from the new English Supreme Court Practice (1979) which brought forth the provision (O 53 r 4) that leave to apply for judicial review will be refused only if there has been 'undue delay' or 'unreasonable delay' in making the application. But the Rules of the High Court 1980 are our own rules of procedure and we must abide by them as they appear.

[69] A prompt move to apply for a judicial review is therefore necessary in this instance. More so when the project on the buffer land had been completed with expenditure of public funds amounting to RM6,431,893.60.

[70] The time frame for taking action as provided under O 53 r 3(6), is more significant in a case involving projects undertaken upon permission given by a local authority such as this. In *Griffiths & Anor v Secretary of State for Enviroment & Anor* [1983] 2 AC 51, the House of Lords emphasised on the need to carry out a proposed development without fear of any certainty in a situation where planning permission is required to undertake a project. Lord Bridge made this observation:

> The six weeks' time limit is of much greater importance in a case where the decision was to grant planning permission. Six weeks after the Secretary of State has granted permission for development on appeal, the applicant for that permission should be in a position to proceed with confidence to carry out the development or to buy or sell the land with the benefit of the permission. But if time does not start to run until all interested parties have been given notice of the decision, and if, by some administrative oversight, the decision was never communicated either to the local planning authority or to a tenant farmer, the permission would be liable to be invalidated after the development had been carried out or the land had changed hands at a price reflecting the value of the planning permission. I do not believe such a bizarre result can have been intended.

A [71] The above case may be used by way of analogy in this appeal since the project on the buffer land had proceeded with the approval of the first respondent although no planning permission was needed.

B [72] Based on the authorities mentioned above, we are of the view that leave to apply for this judicial review should not therefore have been granted to the appellants since the learned judge had no jurisdiction to allow it in the first place due to the appellants' unaccountable breach of O 53 r 3(6) of the RHC.

C [73] We also agree with the learned judge's finding that the decision as alleged by the appellants is artificial and is thus not susceptible to judicial review.

THE SUBSTANTIVE APPLICATION

D

[74] The learned judge went on to consider the matters raised in the substantive application, although Her Ladyship upheld the objection taken up by the respondents, and for want of jurisdiction, need not, we feel, have

E proceeded further.

[75] We however wish to address another matter raised in submission by the appellants, at both preliminary and substantive arguments levels.

F [76] This was the issue of legitimate expectation of the appellants

[77] To recall, it was argued by learned counsel of the appellants that by the conduct of the first respondent in engaging in further dialogue with the appellants/DKORA there arose a representation which resulted in a

G legitimate expectation favouring the appellants/residents or tenants of the condominium that the buffer land would remain a recreational area or an open space.

H [78] In this regard learned counsel contended that the KL Structure Plans have legal status and cannot be disregarded. It was argued that the first respondent knew that the buffer land was designated a 'recreational area' and to use it as a burial ground is thus in violation of the designated use.

I [79] It was argued that it was because of this legitimate expectation that drove the appellants to ultimately write the 22 December 2004 letter to the first respondent.

[80] In the substantive arguments it was further submitted that the appellants had a legitimate expectation to a right to be heard and consulted. A

[81] The affidavit evidence however shows that the so called buffer land (which is government reserve land) was never meant to be an open space or a recreational area. It was actually originally meant for the construction of a sewerage treatment plant. B

[82] On the KL Structure Plans this uncontradicted assertion was made by the first respondent: C

> 21.3 Pelan Struktur mempunyai jangka masa dua puluh (20) tahun dan hendaklah dikaji semula dari masa ke semasa untuk membolehkan pengubahsuaian selaras dengan perubahan keadaan dan masalah-masalah yang dihadapi oleh Wilayah Persekutuan. D
>
> 21.4 Pelan Struktur mengandungi dasar dan matlamat yang umum bagi pembangunan dan gunatanah dan ia tidak menunjuk atau menentukan secara terperinci kegunaan tiap-tiap bidang tanah yang terdapat dalam kawasan Pelan Struktur. E
>
> (Eksibit CKL 8 — perenggan 1 — muka surat 1-1)
>
> 24.1 Pelan Struktur 2020 disediakan oleh kerana kebanyakan polisi-polisi di dalam Pelan Struktur 2000 terpaksa dikaji semula akibat perkembangan pesat di dalam ekonomi dan perubahan-perubahan yang berlaku dalam tempoh masa dua puluh (20) tahun. F
>
> 24.4 Tanah perkuburan bagi orang Islam dan bukan Islam di Bandaraya Kuala Lumpur adalah berkurangan dan hanya dianggarkan akan menampung keperluan masyarakat di Kuala Lumpur selama sepuluh (10) tahun daripada 2000. G
>
> (Eksibit CKL-8 – perenggan 633 — muka surat 13-13).

[83] The KL Structure Plans which is made under s 10(1) of the Federal Territory (Planning) Act 1982 (Act 267) is a document stating the vision, policies and goals to guide the development of Kuala Lumpur. We quote the following introductory paragraph of the said plan: H

> 3 The Kuala Lumpur Structure Plan 2020 (the Plan) contains the vision, goals, policies and proposals to guide the development of Kuala Lumpur (the City) over the next 20 years. It does not contain proposals for detailed physical planning for any specific area. Detailed physical proposals shall be relegated to a subsequent stage of the development plan, that is, the local plan. I

[84] From the evidence above, the following three facts become obvious ie:

(1) the buffer land was not meant to be an open space or recreational area:

(2) that the KL Structure Plans is but a document on planning policies and strategies which are subject to changes and variations in the intervening period during its targeted tenure:

(3) there is a lack of burial grounds for the ever increasing KL population.

[85] We therefore find no basis in the appellants' contention that the KL Structure Plans is a legally binding instrument. We agree with the learned judge that it is a document merely stating the policies of the first respondent and thus not legally binding on anyone.

[86] It is also not a piece of legislation which imposes a public duty upon the first respondent to perform any specific act.

[87] In *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Jaafar v Datuk Bandar Kuala Lumpur & Anor* [2005] 5 MLJ 633, Raus Sharif J had opined on this matter, which we now affirm:

> Secondly, even if there was such a policy it does not bind the first respondent. Policies are in their nature transient and are, unlike statue not generally regarded as binding or giving rise to any legitimate expectation. The only qualification to this statement of principle is where the party claiming the benefit of the expectation is able to show that he took steps in reliance of the policy. This was stated by the Indian Supreme Court in *Narendra Kumar v Union of India* AIR 1989 SC 2138:
>
> > A statement of policy is not a prescription of policy is not a binding criterion (sic). In this connection, reference may made to the observations of *Sagnata Investment Ltd v Norwich Corporation* [1971] 2 QB 614 at p 626. Also the observation in *British Oxygen Co v Board of Trade* [1971] AC 610. See also Foulkes' Administrative Law (6th Ed) at pp 181–184. In *Ex p Khan* [1981] 1 All ER p 40, the court held that a circular of self-made rule can become enforceable on the application of persons if it was shown that it had created legitimate expectation in their minds that the authority would abide by such a policy/guideline. However, the doctrine of legitimate expectation applies only when a person had been given reason to believe that the statue will abide by certain policy or guideline on the basis of which such applicant might have been led to take certain actions.
>
> In the present case there is no evidence whatsoever that the applicant took any steps in reliance of the purported policy. In fact, the applicant should have known of the existence of the master layout plan or ought to have known of the existence of the master layout plan which designated the said land for high density development.

[88] In any event the KL Structure Plans was only gazetted on 4 November 2004, long after the buffer land was approved to be an extended burial ground. A

[89] We could not find any reasons to decide that a legitimate expectation in favour of the appellants emanating from the said KL Structure Plans or the further dialogue held between the parties, post the decision. B

[90] And for this reason, on 10 June 2003, the first respondent decided to extend the existing burial ground which existed since 1984 into the buffer land. This, they are authorised to do under s 94 of of the LGA. C

[91] This extension exercise on the buffer land which is a government reserve land do not require licensing, as was wrongly understood by the DKORA when they sought for an injunctive relief to either stop the issuance of a licence or have it revoked. D

[92] Section 94 of the LGA provides as follows:

> 94 Local authority may provide burial grounds and crematoria and issue licences for the same. E
>
> (1) A local authority may provide suitable places within or without the local authority area to be used as burial grounds or crematoria and shall make proper provision for maintaining the same.
>
> (2) A local authority may, in its discretion, issue licences for the use of other places within the local authority area for the burial or cremating of corpses. F
>
> (3) Every licence for the use of a place as a burial ground or crematorium shall be issued to the registered proprietor of the place in respect of which the same is issued. G

[93] A licence is required only if the local authority allows the use of 'other places' (ie, other than the places provided by it under sub-s (1)) to be utilised as burial grounds or crematoria, in which case the registered proprietors of those 'other places' will need to be so licenced. This clearly refers to alienated private lands. H

[94] The appellants by their own admission stated that they came to the site (we take this to mean that they settled into that neighbourhood as residents of the condominium) as early as 1991. I

[95] The facts also show that appellants Nos 12, 61 and 63 had purchased their condominium units after the commencement of works on the buffer land to extend the existing burial ground, which by then had existed for over seven years.

[96] As such the appellants could not now be heard to complain that the burial ground extension could be a health hazard or a cause for their properties to depreciate in value.

[97] In any event there was no proof to such allegations. We consider these complaints as trifling.

[98] The evidence further shows that even after the works on the buffer land proceeded, planning permission was granted by the first respondent for the land adjacent (ie, Lot 83) to the buffer land to be developed with two blocks of service apartments (861 units), an office block and a multi-level car park.

[99] The confidence now shown by the developers of Lot 83 to proceed with this new project next to a burial ground demolishes the argument that an extension of the burial ground would be detrimental to the life and health of residents and reduce the value of properties in the neighbourhood. In our view, without cogent evidence, this fear was nothing but an exaggerated misconception.

[100] It is perhaps apt here for us to borrow this observation from *Davies v Macedon Ranges SC* [1999] VCAT 196 to accentuate this point. It states:

> It is considered that this (referring to the psychological effect of cemetery and crematorium) is not a reasonable apprehension. Cemeteries are normally a part of both urban and rural communities, and while in a sense they are a reminder of death, *for the reasonable person* this is just one of the many things in life which reminds us of our humanity
>
> (Emphasis added.)

A DISCRETIONARY REMEDY

[101] In *Khoo Ah Imm @ Chang Bee Kiam & Ors v Datuk Bandar Kuala Lumpur & Anor* [1997] 2 MLJ 602, the first respondent and second respondent entered into a joint venture agreement to develop a piece of land belonging to the first respondent. The land was situated below a condominium belonging to the appellants. When earthworks commenced, cracks began to appear in the condominium. The first respondent then issued a stop work order, which he later rescinded. Against that order the appellants

applied for certiorari on the ground that they were victims of procedural unfairness. The respondents, inter alia, argued that the doctrine of legitimate expectation to receive such fairness should be withheld if the consequence of injecting that doctrine was to produce a burdensome or unjust result.

[102] The Court of Appeal whose decision we reaffirm, dismissed the appeal and made the following findings:

(1) Now, it is well settled that certiorari is one of those remedies in public law which cannot be claimed *ex debito justitiae*, but is a discretionary remedy. An applicant who makes out a case may yet be denied the remedy on a number of grounds, depending on the facts and circumstances of each case. For example, an applicant for certiorari who is able to establish that a wrong has been done to him in public law may be denied relief on the ground that the public interest outweighs his grievance (see *Smith & Ors v Inner London Education Authority* [1978] 1 All ER 411). The factors which a court may take into account when denying relief are so numerous and so variable that it is unwise and impossible to list them out.

(2) While the powers of the court in public law remedy cases are very wide, great caution must be taken in exercising them. Justice of the present case lies in refusing the remedy rather than in granting it. The appellants were not without any remedy. Their private law remedy in this case was far more efficacious and would produce the result which they desire.

(3) Further, the practicalities of the present case did not warrant the application of the doctrines of procedural fairness or legitimate expectation. The application of these doctrines would produce injustice.

[103] In our view the learned judge had properly exercised her discretion. We are not convinced, even after taking into account the appellants' arguments in the substantive application, that the learned judge had failed to take into consideration relevant matters or had taken into account irrelevant factors in coming to a decision to dismiss this application.

[104] It is clear from the judgment in *Khoo Ah Imm* that this court now also needs to consider 'the practicalities of the case' and whether the grant of such reliefs as sought would produce an injustice.

[105] This principle is expressed in the following way by Bose J in *Sangram Singh v Election Tribunal* AIR 1955 SC 425 (referred to in *Khoo Ah Imm*'s case):

A ... and though no limits can be placed upon that discretion, it must be exercised along recognised lines and not arbitrarily; and one of the limitations imposed by the courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued or is likely to ensue.

B **[106]** The project on the buffer land has long been completed although till now not yet utilised in view of this pending case. Public monies have been spent. Meanwhile the public awaits this new facility.

C **[107]** The first respondent has shown that there is a critical demand for more Muslim burial grounds for the growing population in Kuala Lumpur.

[108] In our considered view, the balance of justice here, lies in favour of the respondents. In our finding, there is nothing illegal or improper for the D respondents to use the buffer land as an additional burial ground. And certainly no substantial injustice has ensued to the appellants here.

[109] This public interest consideration was also recently applied by the High Court in *Kembang Masyur Sdn Bhd lwn Milik Perusahaan Sdn Bhd & E lain-lain* [2005] 4 MLJ 553 where a declaration sought by the plaintiff was refused on the ground that 'it would cause inconvenience to society at large as the plaintiff's application required the roads and flyover which has been built to be torn down'.

F **[110]** For these reasons, this appeal is dismissed with costs.

Appeal dismissed with costs.

G Reported by Sally Kee

H

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